No. 87-946

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF PALO ALTO, CITY OF PALO ALTO UTILITIES, AND CITY OF ATHERTON,
Appellants,

VS.

CENTURY FEDERAL, INC., UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does a municipal franchising authority violate the First Amendment when it requires a cable franchisee to comply with Section 612 of the Cable Communications Policy Act of 1984 ("the Cable Act"), 47 U.S.C. § 532, and set aside a specified number of cable channels for commercial use by unaffiliated persons?

2. Does a municipal franchising authority violate the First Amendment when it seeks to comply with Section 621(a)(3) of the Cable Act, 47 U.S.C. § 541(a)(3), which requires local franchising authorities to ensure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides, by imposing a requirement on a cable franchisee that it must provide cable service throughout the entire city?

3. Does a municipal franchising authority violate the First Amendment when it exercises the authority granted by Section 611 of the Cable Act, 47 U.S.C. § 531, to require a cable franchisee to provide channel capacity for public, educational and governmental use?

4. Does a municipal franchising authority violate the First Amendment when it exercises the authority granted by Section 624(b) of the Cable Act, 47 U.SC. § 544(b), to require a cable franchisee to provide facilities and equipment specified in the franchise, such as adequate channel capacity, two-way capability and an "institutional network"?

5. Does a municipal franchising authority violate the First Amendment when it exercises the authority granted by Section 621(a) of the Cable Act, 47 U.S.C. § 541(a), and decides to limit the number of franchises it will award within its jurisdiction?

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JURISDICTIONAL STATEMENT

Appellants City of Palo Alto, City of Palo Alto Utilities and City of Atherton appeal from an order issued by the United States District Court for the Northern District of California, dated September 1, 1987. In this order, the District Court held that Appellants violated the First Amendment in exercising their authority under Sections 611(c), 612(b), 621(a)(3) and 624(b) of the Cable Communications Policy Act of 1984 ("the Cable Act"), 47 U.S.C. §§ 531(c), 532(b), 541(a)(3), and 544(b), to require Appellee Century Federal, Inc., a cable franchisee, to provide universal service, public, educational, governmental and commercial leased access channels, and a cable system with adequate channel capacity and specified facilities and equipment.

OPINIONS BELOW

The District Court's September 1, 1987 opinion is not yet reported. It appears in the appendix hereto ("App.") at pp. 1a-15a. An earlier opinion rendered by the District Court in this case is reported at 648 F. Supp. 1465 (N.D. Cal. 1986) and reprinted at App. 16a-46a. An opinion issued by the District Court in a prior case between certain of the parties to this action is reported at 579 F. Supp. 1553 (N.D. Cal. 1984) and reprinted at App. 47a-74a.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1252. The District Court's order finding several provisions of the Cable Act unconstitutional as applied by Appellants was entered on September 1, 1987. App. 1a. Notice of Appeal was timely filed on October 1, 1987 in the District Court. App. 78a. On November 23, 1987, Justice O'Connor extended the time to docket this appeal to and including December 7, 1987.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case principally involves the First Amendment and several provisions of the Cable Act. The First Amendment provides:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

Sections 611(a), (b), and (c) of the Cable Act, 47 U.S.C. §§ 531(a), (b), and (c), provide in relevant part:

"(a) A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

"(b) A franchising authority may in its request for proposals require as part of a franchise . . . that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for education or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

"(c) A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section."

Sections 612(a) and (b) of the Cable Act, 47 U.S.C. §§ 532(a) and (b), provide in relevent part:

"(a) The purpose of this section is to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

"(b) (1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

* * * *

(2) Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified in paragraph (1), except as otherwise provided in this section."

Sections 621(a) and (b) of the Cable Act, 47 U.S.C. §§ 541(a) and (b), provide in relevant part:

"(a) (1) A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.

* * * *

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

"(b) (1) Except to the extent provided in paragraph (2), a cable operator may not provide cable service without a franchise."

Sections 624(a) and (b) of the Cable Act, 47 U.S.C. §§ 544(a) and (b), provide:

"(a) Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

"(b) In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system—

* * * *

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise—

(A) for facilities and equipment . . . ."

In addition, this case also involves provisions of Appellants' cable franchising ordinance ("Ordinance"), which seeks to exercise the authority granted by the Cable Act. The relevant provisions of the Ordinance are set out at App. 131a- 150a.

STATEMENT OF THE CASE

The events giving rise to this case began in 1979, when new technology led to heightened citizen interest in obtaining a local cable television system in the City of Palo Alto, California. In 1982, Palo Alto initiated discussions with neighboring communities and Stanford University regarding possible joint participation in the development of a cable system. The enhanced oppportunity for obtaining a viable cable system that would result from enlarging the service area led several of these jurisdictions to sign a Joint Exercise of Powers Agreement ("JPA") and agree to work with Palo Alto to develop a joint cable television franchising process.

The initial step in this process was the development of a Request For Proposals ("RFP"), prepared by the Cities[1] after consultation with legal, financial, and technical experts, and a series of public meetings. The RFP invited interested parties to apply for a cable franchise, and directed applicants to address specific "minimum requirements," which it described. These minimum requirements reflected such important governmental interests as ensuring availability of service to all households, mandating public, educational, and governmental (PEG) access channels, requiring additional channels for commercial leased access, and ensuring that a technically sound, up-to-date system with adequate channel capacity would be built.

Four applicants responded to the RFP. In addition, the Cities received a four-page letter from Appellee Century Federal, Inc. offering to build a cable system in Palo Alto, Menlo Park and

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[1] For convenience, we shall refer to the RFP jurisdictions as "the Cities" even though one of them is a county (San Mateo), another is a town (Atherton), and a third is Stanford University.

Atherton. However, Century Federal refused to participate in the RFP process and declined to provide virtually all of the information requested by the Cities. Instead, Century Federal filed an action in federal district court, contending that it was entitled to provide cable within Palo Alto, Menlo Park and Atherton without securing a franchise. On motions to dismiss, the District Court dismissed Century Federal's antitrust claims, but held that it had stated a claim for relief under the First Amendment. App. 47a-74a.

In 1984, Congress passed the Cable Act, which established a comprehensive federal framework for the regulation of cable television by local franchising authorities. Shortly after the Act's passage, the District Court indicated that it would dismiss the action as moot if the Cities did not award a cable franchise prior to the effective date of the Act, December 29, 1984. App. 80a-82a. The court stated that because "the new Act clearly endorses the right of a designated governmental authority to offer an exclusive franchise to a cable operator" (App. 80a), if the Cities did not issue a franchise prior to the Cable Act's effective date, "any remaining challenge the plaintiff might have to the Cities' authorization process would need to be in the form of a new lawsuit based either upon the terms of the Act or upon the ground that the Act itself is unconstitutional." App. 81a. When the Cities did not award a franchise by December 29, 1984,[2] the action was dismissed without prejudice in January, 1985. App. 83a.

Since the Cities still refused to grant Century Federal a franchise because it had not participated in the RFP process, a new lawsuit was filed in March 1985. App. 84a-105a. In its new Complaint, Century Federal attacked the Cities' refusal to issue it a franchise as well as their use of the franchising process to obtain access channels, adequate channel capacity, and specified facilities and equipment. App. 90a-99a, 102a-103a. The Complaint anticipated that Appellants would contend that their cable franchising process was authorized by state and federal statutes and alleged that these statutes, as applied to Century Federal,

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[2] The Cities subsequently awarded a franchise to one of the applicants that had responded to their RFP. On October 7, 1985, Palo Alto, acting as the lead agency under the JPA, awarded a franchise to the Cable Communications Cooperative of Palo Alto, Inc. (the "Cable Coop").

were unconstitutional. App. 102a-103a.[3] The Complaint sought an order permitting Century Federal to build a cable system in Palo Alto, Menlo Park and Atherton. App. 104a.

Two weeks after this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, ____ U.S. ____, 90 L. Ed. 2d 480 (1986), Century Federal moved for partial summary judgment. In December, 1986, the District Court granted the motion. App. 16a-46a. The District Court held that even though (as it was required to assume for purposes of its decision) cable television in the Cities is a natural monopoly, the only interest that constitutionally could be served by limiting the number of cable franchises was the Cities' interest in preventing physical disruption. App. 35a-36a, 38a, 41a-42a.[4] The court also concluded that

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[3] Thus, the Complaint alleged:

> "50. Each act taken by defendants, and each of them, has been taken under color of governmental authority and pursuant to an official policy or custom of such authority. Plaintiff is informed and believes, and thereon alleges, that the governmental authority under color of which defendants have purported to act is California Government Code Section 53066 and 42 U.S.C. Sections 601 *et seq.*, and that defendants contend that these provisions authorize them to take the restrictive actions described above . . . ."
>
> * * * *
>
> "52. To the extent that defendants attempt to apply Government Code Section 53066 and/or 42 U.S.C. Sections 601 *et seq.* in a manner designed to authorize auctioning off the cable television market within their boundaries, thus automatically excluding all but one willing speaker, said statutes (as so applied) are unconstitutional." (App. 102a-103a)

While the Complaint refers to "42 U.S.C. Sections 601 *et seq.*," that statute (which establishes the AFDC program) has nothing to do with cable television. Instead, the federal statute referred to in the Complaint must have been the Cable Act, which appears in 47 U.S.C., not 42 U.S.C., and which is Section 601 *et seq.* of Public Law 98-549.

[4] As the District Court noted in its opinion, Appellants and Century Federal "hotly contested the question of whether the CTV market in the proposed service areas is a natural monopoly." App. 28a. However, the District Court concluded that this dispute did not present a triable issue

Appellants could not deny a franchise to Century Federal by virtue of this interest, since the Cities had failed to show that installing two systems simultaneously would be more disruptive than installing one. App. 43a-45a. However, the court expressly refrained from deciding whether the Cities could impose minimum requirements on all franchisees such as those described in the RFP. App. 45a.

In order to implement its order granting Century Federal partial summary judgment, the District Court on March 23, 1987 issued a preliminary injunction. App. 75a-76a. Under the injunction's terms, Appellants were required to issue a "license," as defined in Section 602(8) of the Cable Act, 47 U.S.C. § 522(8), permitting Century Federal to construct and operate a cable system within the Service Area defined in the franchise previously granted to Cable Coop. *Id.* In compliance with this order, Palo Alto, acting as lead agency under the JPA, issued a license to Century Federal authorizing it to construct a cable system within Palo Alto, Menlo Park and Atherton.[5]

In drafting this license, Palo Alto exercised its authority under the Cable Act to ensure that the Century Federal license served the interests it had identified during the RFP process. Accordingly, the license required Century Federal to provide commercial

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of fact because its resolution was not legally material to the issues raised by the pending motion. App. 39a-42a. Because the court analogized cable television to newspapers (25a-27a, 29a-30a), it held that even if cable were a "natural monopoly," that fact could not legally justify limiting the number of cable franchisees. App. 35a-36a, 39a-42a. For this reason, the District Court explicitly rejected Appellants' argument that limiting the number of cable franchisees could be supported by the fact that such limits would enhance the ability of franchising authorities to persuade a monopoly franchisee to provide PEG access channels, universal service, adequate channel capacity, and a modern, technically sophisticated system. App. 39a.

[5] The license which Palo Alto adopted pursuant to the District Court's preliminary injunction incorporated a previously-enacted franchise ordinance which Palo Alto had adopted after the District Court's grant of Century Federal's motion for partial summary judgment, but before issuance of the preliminary injunction. App. 131a-150a. Since the applicable substantive provisions are set forth in the ordinance, we have cited that document when referring to the Century Federal license.

leased access channels (Ordinance §§ 3.7.01- 3.7.05; App. 133a-136a), government access channels (Ordinance §§ 4.2.01-4.2.04, 4.2.06; App. 139a-141a), and channels for public and educational uses (Ordinance §§ 4.3.01-4.3.06; App. 141a-143a); to construct a system that offered cable service throughout the Cities (Ordinance § 3.2; App. 132a); and to provide a system with at least 80 channels,[6] two-way capacity, and an "institutional network."[7] Ordinance §§ 3.6, 4.5.01; App. 133a, 144a-145a.[8]

After Century Federal indicated that it believed almost all of the provisions of its license to be unconstitutional, the District Court decided to consider the constitutionality of the challenged provisions through motions for summary judgment. Accordingly, in April 1987, Appellants filed a motion seeking partial summary judgment upholding the constitutionality of the requirements in Century Federal's license for commercial and PEG access, universal service, adequate channel capacity and specified facilities

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[6] While the Century Federal license does not explicitly require the licensee to provide a fixed number of channels, it does require a 550 Mhz cable. Ordinance Appendix A; App. 147a. The capacity of such a cable is approximately 80 channels.

[7] An "institutional network" is a designated portion of a cable system's channel capacity which is generally available only to non-residential subscribers. *See* H. R. Rep. No. 934, 98th Cong., 2d Sess. ("House Report") 46. The institutional network is intended to be used for services such as high speed data transfer, two-way videoconferencing, and medical information exchange. *See* Ordinance § 4.5.01; App. 145a.

[8] Because the ordinance requires Century Federal to build a "State of the Art" system (Ordinance § 3.1, App. 132a), the parties and the district court referred generally to the Ordinance's facilities and equipment obligations as "state-of-the-art" requirements. *See, e.g.*, App. 8a. It is important to note, however, that these requirements do not compel Century Federal to do the impossible or even the economically infeasible. The Ordinance defines "State-of-the-Art" as meaning "that level of technical performance or capacity, service, plant or other equipment . . . which has been developed and demonstrated to be workable and economically feasible and viable from time to time throughout the term of this franchise." Ordinance § 1.44, App. 131a. The requirement that Century Federal modernize its system throughout the franchise term is also subject to Century Federal's agreement that such changes are "economically viable and feasible." Ordinance § 3.9.01; App. 137a.

and equipment.[9] In response, Century Federal filed a cross-motion for partial summary judgment, contending that each of these requirements was unconstitutional.

Shortly before the hearing on these motions, Appellants requested the District Court to provide notice to the Attorney General pursuant to 28 U.S.C. § 2403(a).[10] In response to this request, Century Federal filed an "Amended Notice of Claim of Possible Unconstitutionality Pursuant to 28 U.S.C. Section 2403(a) and (b)." App. 108a-109a. In this notice, Century Federal acknowledged that its action "question[ed] the constitutionality of the Cable Communications Policy Act of 1984 . . . under the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution . . . insofar as any or all of those provisions authorize or require, or are construed to authorize or require . . . the abridgment of the right to freely speak and publish . . . as is evidenced by the ordinances of defendants being applied to the construction and operation of a cable system." App. 109a.[11]

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[9] Appellants also sought rulings upholding certain financial obligations imposed by the license, including the payment of a 5% franchise fee. These issues have not yet been resolved by the District Court, since the court's September 1, 1987 order requested further briefing and information concerning these franchise provisions. App. 10a-15a.

[10] 28 U.S.C. § 2403(a) provides in relevant part:

> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."

[11] Local Rule 200-8 of the Northern District of California implements 28 U.S.C. § 2403(a) by requiring counsel whose client questions the constitutionality of an Act of Congress in litigation to which the United States or a federal officer or employee is not a party to give notice of the constitutional question to the assigned judge. Century Federal had filed a notice pursuant to this rule in August 1985, giving notice that it "question[ed] the constitutionality of the [Cable Act] if and to the extent such Act is construed . . . so as to grant defendants . . . the authority to limit the number of cable television systems operating within their

On June 10, 1987, the District Court addressed a letter to the Attorney General, in which it certified pursuant to 28 U.S.C. § 2403(a) that the pending motions drew into question seven sections of the Cable Act. App. 110a-111a. The notice advised the Attorney General that "[t]he United States may intervene in this action by filing a memorandum . . . addressing the question of the Act's constitutionality." App. 110a.

In response to the District Court's notice, the United States intervened by filing a memorandum entitled "Response of United States to Question of Constitutionality of Cable Communications Policy Act of 1984." App. 112a-128a. In its response, the United States argued that the Cable Act did not authorize Appellants to promulgate most of the franchise provisions challenged by Century Federal, but only provided that such provisions, once enacted by the Cities, would not be preempted by federal law. App. 119a-120a, 125a.[12] As a result, the United States contended that the District Court did not have to decide whether the challenged provisions of the Cable Act were constitutional in order to rule on the pending motions. App. 125a. Since the filing of its Memoran-

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[12] The United States acknowledged, as it had to, that Section 612 of the Cable Act, 47 U.S.C. § 532, requires, rather than authorizes, commercial leased access. App. 121a. However, the United States contended that the District Court did not have to decide whether such access is constitutional, because the Act's commercial leased access requirement does not apply to cable systems with fewer than thirty-six activated channels. App. 126a-127a. Thus, even though Century Federal did not contend that it would build such a system, the United States argued that the constitutionality of Section 612 was not presently at issue in the proceeding. App. 126a. The district court did not accept the United States' argument, since it ruled that commercial leased access is unconstitutional.

Section 621(a)(3) of the Cable Act, 47 U.S.C. § 541(a)(3), requires that franchising authorities take steps to ensure that access to cable is not circumscribed due to economic discrimination, a requirement that Appellants complied with by requiring Century Federal to provide universal service. However, the memorandum filed by the United States did not explain why Century Federal's challenge to Appellants' universal service requirement did not implicate the constitutionality of Section 621(a)(3). Indeed, the memorandum did not so much as mention that statute, let alone attempt to explain why its constitutionality was not before the district court.

dum, the United States has conducted itself and been treated by the District Court and the remaining parties as a party to this action: it participated in a status conference held by the District Court soon after the filing of its Memorandum, it has requested and received service copies of all pleadings,[13] and it has been subject to the District Court's procedural rulings. App. 15a.

On September 1, 1987, the District Court issued an order holding that the access channel, universal service, and facilities and equipment requirements contained in the Century Federal license violate the First Amendment. App. 1a-15a. In a footnote, the court stated that because the Cable Act "authorizes, but does not mandate, the minimum requirements" held unconstitutional in its decision, the court did not "purport to make any determination on the constitutionality of any particular provisions of the Act." App. 2a n.1. On October 1, 1987, Appellants filed a notice of appeal to this Court pursuant to 28 U.S.C. § 1252 from the District Court's September 1 order. App. 78a-79a.[14]

I

ARGUMENT

THE COURT HAS JURISDICTION OVER THIS APPEAL

28 U.S.C. § 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit or proceeding to

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[13] *See, e.g.*, App. 129a-130a (proof of service filed by Century Federal identifying U.S. Attorney as counsel for one of the parties).

[14] Shortly after the notice of appeal was filed, one of the cities that appealed (Menlo Park) made an offer of judgment under Federal Rule of Civil Procedure 68 which Plaintiff accepted. As a result, Menlo Park has dismissed its appeal from the District Court's rulings. The remaining Defendants, who are Appellants here, have not settled with Century Federal and continue to prosecute this appeal.

which the United States . . . is a party." All of the preconditions for jurisdiction over this appeal are met in this case. Although the District Court purported not to decide the constitutionality of any provision of the Cable Act, its decision in fact holds that numerous sections of that statute are unconstitutional. *See* Part I(A), *infra*. Moreover, the United States intervened in the proceeding below by filing a memorandum in response to the District Court's certification; it therefore became a party to the action. *See* Part I(B), *infra*.[15]

A. The District Court's Decision Invalidates the Core Provisions of the Cable Act Requiring Franchising Authorities to Impose Commercial Leased Access and Universal Service Requirements and Authorizing the Imposition of Requirements for Public, Educational and Governmental Access and Standards for Facilities and Equipment

In its September 1, 1987 order, the District Court stated that because the Cable Act authorizes, rather than requires, the franchise provisions which the court found unconstitutional, the court would not "purport to make any determination on the constitutionality of any particular provisions of the [Cable] Act." App. 2a n.1. However, "[t]his Court's appellate jurisdiction does not turn on . . . semantic niceties." *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 317 (1985). Looking at what the District Court did—as opposed to what it said it did—leads inescapably to the conclusion that the court below found numerous provisions of the Cable Act to be constitutionally infirm.

1. Contrary to the District Court opinion, the Cable Act does more than simply "authorize" franchising authorities to impose specified requirements. Section 612 *requires* franchisees such as Century Federal to provide commercial leased access channels, while Section 621(a)(3) *requires* franchising authorities to assure that access to cable is not denied to any group of potential residential cable subscribers because of the income of the local area in which such subscribers reside. Appellants sought to

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[15] The other preconditions for taking an appeal under Section 1252 are plainly met here: the proceeding below is a civil action and the District Court is a "court of the United States" within the meaning of Section 1252. *See* 28 U.S.C. § 451.

comply with these federal mandates by imposing in Century Federal's license requirements to provide eight commercial leased access channels and wire the entire Service Area. Ordinance §§ 3.2; 3.7; App. 132a, 133a-136a. The District Court's holding that Appellants constitutionally may not impose either of these requirements thus directly contradicts the Congressional mandate that such obligations be imposed on cable franchisees.

a. Section 612(b)(1) of the Cable Act, 47 U.S.C. § 532(b)(1), provides that "[a] cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator" in accordance with a schedule set forth therein.[16] Pursuant to this statute, Appellants required Century Federal to provide eight channels for commercial leased access, the number "derived by applying the formula contained in Section 612 of the Cable Act to the capacity of [Century Federal's] System." Ordinance § 3.7.01; App. 133a.

In its September 1, 1987 order, the District Court held all third-party access requirements unconstitutional, without differentiating between commercial leased access and the PEG access authorized (but not compelled) by the Cable Act or even recognizing that commercial leased access is required by federal law. In so ruling, the court necessarily held that Section 612(b)(1) is unconstitutional.[17] If Appellants cannot constitutionally require

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[16] Cable operators with systems comprising between thirty-six and fifty-four activated channels must designate for commercial leased access ten percent of those channels which are not otherwise required for use by federal law. § 612(b)(1)(A), 47 U.S.C. § 532(b)(1)(A). Systems with between fifty-five and one hundred activated channels shall designate fifteen percent of the channels not regulated by federal law. § 612(b)(1)(B), 47 U.S.C. § 532(b)(1)(B). If the system has more than 100 activated channels, fifteen percent of all such channels shall be designated for commercial leased access. § 612(b)(1)(C), 47 U.S.C. § 532(b)(1)(C). Finally, no requirement to provide commercial leased access is permissible if a cable system carries less than thirty- six activated channels. § 612(b)(1)(D), 47 U.S.C. § 532(b)(1)(D).

[17] Under the Cable Act, a franchising authority is prohibited from requiring commercial leased access for a cable system with fewer than thirty-six activated channels. § 612(b)(1)(D), 47 U.S.C. § 532(b)(1)(D). However, Century Federal did not contend below that it would build such a system or argue that Appellants' commercial

commercial leased access—even when acting pursuant to explicit federal authority—then neither can the federal government. Moreover, if commercial leased access is unconstitutional, then the power granted to franchising authorities by Section 612(b)(2) of the Cable Act to require such access is a nullity.

b. Section 621(a)(3) of the Cable Act provides that "[i]n awarding a franchise . . . a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." As the Act's legislative history reveals, this provision was intended to require local franchising authorities to impose universal service obligations. Thus, the section-by-section analysis of the Act prepared by the House Committee on Energy and Commerce stated:

> "[Section 621(a)(3)] provides that in awarding the franchise, the financing authority shall assure that no class of potential residential cable subscribers is denied cable service due to income or economic status. In other words, cable systems will not be permitted to 'redline' (the practice of denying service to lower income areas). *Under this provision, a franchising authority in the franchise process shall require the wiring of all areas of the franchise area to avoid this type of practice.*" (House Report at 59 (emphasis added))[18]

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leased access requirements violated the Cable Act's prohibition. Nor did the District Court refuse to consider the constitutionality of commercial leased access on the basis that Century Federal might build a cable system with less than thirty-six channels. Instead, the District Court simply held that commercial leased access—like public, educational and governmental access—is unconstitutional.

[18] *See also id.* at 20 (Cable Act "[r]equires that cable service be made available in all areas of a city, so that residents of lower income areas are not deprived of cable service"); 130 Cong. Rec. H10436 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (same).

There is an indication in the legislative history of the Act that Section 621(a)(3) was not intended to require cable franchisees to wire homes too remote to serve economically. 130 Cong. Rec. H10442 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth). But Century Federal has never contended that any home within the Service Area is too "remote" to be provided economically feasible cable service. Nor did the District Court make any such finding.

Appellants sought to fulfill their obligation under Section 621(a)(3) to prohibit economic discrimination by requiring Century Federal to wire the entire Service Area. Ordinance § 3.2; App. 132a. However, this provision was invalidated by the District Court. App. 7a-8a. In so ruling, the District Court necessarily ruled that Section 621(a)(3), which required Appellants to impose the universal service requirement invalidated by the District Court, cannot be constitutionally enforced. Thus, the District Court's decision invalidated both of the mandatory obligations imposed by the Cable Act on local franchising authorities: to require commercial leased access and universal service.

c. This Court has held that Section 1252 applies where a district court invalidates state legislation enacted pursuant to a federal statutory requirement. In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), plaintiff challenged a California statute passed to implement a provision of the Federal Unemployment Tax Act ("FUTA") which required the States to provide unemployment insurance coverage to schools that were operated primarily for religious purposes, but which were not supervised, controlled or principally supported by a church. *Id.* at 398-99. The District Court held that such schools could not be constitutionally taxed under FUTA, and defendants appealed to this Court. In holding that jurisdiction existed to review the District Court's order pursuant to Section 1252 even though that court did not explicitly invalidate the federal statute, this Court emphasized the District Court's finding that the federal and state provisions comprised a single statutory "scheme" in which the state statute had been passed to comply with an obligation imposed by federal law. *Id.* at 406; *see also id.* at 398.

This Court has jurisdiction over this appeal for reasons similar to those which led to the assumption of jurisdiction in *Grace Brethren Church*. In both cases, state and/or local authorities complied with a federal statutory mandate by passing legislation which the plaintiffs successfully challenged in district court as unconstitutional. Similarly, in both cases, the District Court's holding that state and/or local governments could not constitutionally comply with the requirements of federal law threatened to disrupt a single, unified scheme involving both federal and state law in which the state statute explicitly invalidated by the district court simply obeyed a federal command. For these reasons, the

District Court's ruling that Appellants' commercial leased access and universal service requirements are unconstitutional may be directly appealed to this Court, even though the District Court in this case—as in *Grace Brethren Church*—did not explicitly invalidate the federal statute which compelled Appellants to impose these license requirements on Century Federal.

2. Since the invalidation of even a single federal statute confers jurisdiction under 28 U.S.C. § 1252 (*see, e.g., United States v. Hemme*, 476 U.S. 550 (1986)), such jurisdiction would exist in this case even if the District Court had done no more than invalidate either the commercial leased access required by Section 612(b) of the Cable Act or the universal service compelled by Section 621(a)(3). But in fact the lower court's decision invalidated numerous other provisions of the Cable Act as well.

The District Court acknowledged that "the Cable Act authorizes . . . the minimum requirements addressed" in the court's opinion. App. 2a n.1. Yet the court simultaneously found that Appellants' *exercise* of that federally-granted authority—in the form of Appellants' PEG access and facilities and equipment requirements—violated the First Amendment. App. 3a-10a. Thus, the District Court has held that Appellants unconstitutionally exercised authority conferred by the Cable Act in imposing PEG access and facilities and equipment requirements.[19]

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[19] Whether a franchising authority's power under Section 624(b)(2)(A) of the Cable Act, 47 U.S.C. § 541(b)(2)(A), to require specified facilities and equipment in a franchise is consistent with the First Amendment is, of course, an analytically distinct issue from whether that authority has been preempted by the FCC. *See City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987), *cert. granted*, ____ U.S. ____, 56 U.S.L.W. 3383 (Nov. 30, 1987). If, however, as the District Court found, the power granted by the Cable Act cannot be constitutionally exercised, then the preemption issue raised in *City of New York* need not be decided. Conversely, the First Amendment issue will remain ripe for review even if the FCC's position in *City of New York* is upheld by this Court, since even the FCC concedes that Section 624(b) gives franchising authorities power "to specify generically the composition and configuration of the cable system . . . ." *Id.* at 725 n.5. For these reasons, the First Amendment issue which this case presents will need to be decided whatever the ruling in *City of New York*.

As the District Court acknowledged, the Cable Act unambiguously provides authority for Appellants to impose each of these requirements. App. 2a n.1. In Section 611(c) of the Act, 47 U.S.C. § 531(c), Congress granted local franchising authorities the power to "enforce any requirements in any franchise regarding the providing or use of . . . channel capacity" for public, educational, or governmental access. In Section 624(b)(2)(A) of the Act, 47 U.S.C. § 544(b)(2)(A), Congress provided that a franchising authority "may enforce any requirements contained within the franchise for facilities and equipment . . . ." The legislative history of the Cable Act reveals that these provisions were understood as explicit grants of federal authority to local franchising agencies, rather than statutes that simply removed the threat of federal preemption, as the United States contended below.[20]

The FCC has taken the position in *City of New York* that the Cable Act is an affirmative grant of authority to local franchisers. *See* Brief for the Federal Respondents in Opposition at 6 (Section 624(b) "authorizes franchising authorities to 'establish standards for facilities and equipment' "). This position contradicts the argument advanced by the United States in this case that the Cable Act does *not* confer authority, but instead merely removes the possibility of federal preemption. *See* pp. 10-11, *supra*.

[20] For example, in the House Report on the Cable Act, the Committee on Energy and Commerce explicitly stated that the authority granted by Section 611(b) to require PEG access did not give a franchising authority power to override applicable provisions of state law. House Report at 46. If the Cable Act had done no more than remove the threat of federal preemption, however, this statement would have been unnecessary, since the Act itself would not have conferred *any* authority to require PEG access, let alone authority that might have been understood, absent a contrary statement in the House Report, to supersede state law. *See also id.* at 19 (Cable Act contains "grant of authority to cities to require public, educational and governmental (PEG) access channels"); *id.* at 31 (Act contains provisions, including those relating to PEG access, that may require that channels be set aside for programming by persons other than the cable operator); *id.* at 45 ("Subsection 611(a) grants franchising authorities explicit authority to establish requirements for the designation and use of . . . PEG access channels"). With respect to authorizing facilities and equipment requirements, *see id.* at 26 (Act explicitly grants power to franchising authorities to enforce requirements in franchise to provide particular cable facilities).

The District Court seemed to think that it could invalidate Appellants' exercise of authority granted by the Cable Act without invalidating the Act itself. The District Court erred. A statute that purports to empower government officials to engage in unconstitutional conduct is an unconstitutional statute. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects"); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (statute authorizing warrantless searches by agents of Secretary of Labor held unconstitutional).

This Court has often considered appeals under 28 U.S.C. § 1252 from district court decisions holding unconstitutional federal statutes which purported to authorize government officials to exercise statutorily-defined powers. In *Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986 (1984), for example, the Court considered an appeal from a district court decision holding unconstitutional a statute which granted the EPA authority to use data submitted by one pesticide manufacturer in evaluating the subsequent application of another. Similarly, in *United States v. Raines*, 362 U.S. 17 (1960), the Court took jurisdiction of an appeal from a decision invalidating a statute which authorized the Attorney General to initiate civil actions for injunctive relief to protect the right to vote. *See also Marshall v. Barlow's, Inc., supra.* The fact that Congress saw fit in this case to confer authority on local rather than federal officials does not make a decision invalidating the exercise of that authority any less of a decision invalidating the underlying statute. *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-31 at 401 (1978) ("Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action . . . .").[21]

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[21] Century Federal has always understood that if the Cable Act authorizes Appellants to impose specified conditions on cable franchises, and if those conditions are themselves unconstitutional, then the Act itself is unconstitutional. Thus, Century Federal's complaint alleged that "[t]o the extent that defendants attempt to apply [the Cable Act] in a manner designed *to authorize* auctioning off the cable television market within their boundaries . . . said statutes (as so applied) are unconstitutional." App. 103a (emphasis added); *see* note 3, *supra*. Similarly, Century Federal's initial "Notice of Claim of Possible Unconstitutional-

This Court also has jurisdiction over this appeal because the District Court's decision invalidates the Cable Act as applied by Appellants. Numerous decisions of this Court hold that jurisdiction under Section 1252 exists when a district court invalidates a federal statute as applied. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226, 229 (1983); *Fleming v. Rhodes*, 331 U.S. 100, 102-04 (1947). This case falls within that rule. In adopting the license provisions at issue here, Appellants exercised the authority granted by the Cable Act to impose requirements on Century Federal's cable license, carefully conforming the terms of the franchise to the requirements and limitations of federal law. A holding that Appellants' exercise of that authority violates the First Amendment is thus necessarily a holding that the Cable Act is unconstitutional as applied to Century Federal.

For the foregoing reasons, jurisdiction under Section 1252 would unquestionably exist even if the District Court had done no more than invalidate the Cable Act as applied to a single cable operator, for reasons unique to that plaintiff. *See, e.g., United States v. Lee*, 455 U.S. 252, 255-56 (1982) (Court has jurisdiction under Section 1252 to review district court decision holding Social Security tax unconstitutional as applied to member of Old Order Amish). In this case, however, the need for this Court to exercise its appellate jurisdiction is even greater, for the potential

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ity Pursuant to Local Rule 200-8" stated that Century Federal "question[ed] the constitutionality of [the Cable Act] if and to the extent that such Act is construed . . . so as to grant defendants, or any of them, the authority to limit the number of cable television systems operating within their boundaries to fewer systems tha[n] can be physically accom[m]odated upon the public utility facilities and other public property necessary for the installations of said systems." App. 107a. Finally, when Century Federal amended this notice to encompass its constitutional challenges to the conditions imposed in its license, Century Federal stated that it "question[ed] the constitutionality of the [Cable Act and other statutes], insofar as any or all of those provisions *authorize or* require, or are construed to *authorize or* require . . . the abridgement of the right to freely speak and publish . . . ." App. 109a (emphasis added). Thus, even Century Federal has implicitly acknowledged that the District Court erred in believing that it could invalidate Appellants' exercise of authority under the Cable Act without invalidating the Act itself.

reach of the District Court's opinion is not limited to a single city and a single franchisee. Nothing in the Court's decision invalidating access or facilities and equipment requirements turns on the specific facts of this case. Instead, the court's ruling holds that such franchise requirements are *per se* unconstitutional.[22] Under the District Court's decision, *no* city constitutionally can impose requirements either for PEG access or specified facilities and equipment.[23]

If the District Court's decision stands, the authority which Congress granted cities to enforce such requirements will be wholly eviscerated, inasmuch as no franchising authority will be able to exercise the authority granted by Sections 611(c) and 624(b)(2) of the Cable Act. Thus, the District Court's decision effectively invalidates these statutes.

3. The harm done by the District Court to the Cable Act does not end with the court's invalidation of the Act's mandatory commercial access and universal service requirements and its grants of authority to require PEG access and specified facilities and equipment. The provisions of the Act do not rest in watertight compartments; instead, the invalidation of part of the Act seriously damages the whole.[24] Moreover, the District Court's deci-

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[22] Thus, the court held that requiring access channels unconstitutionally intrudes upon a cable operator's editorial control and judgment (App. 6a), that compelling universal service impermissibly burdens "a CTV operator's First Amendment right to determine where and when it speaks" (App. 8a), and that facilities and equipment requirements do not "further the important or substantial governmental interest" in minimizing cable television's disruption to the public domain. App. 10a.

[23] In *City of Los Angeles v. Preferred Communications*, the Court declined to rule on certain issues relating to the constitutionality of cable franchising due to the lack of a fully developed factual record. *See* 90 L. Ed. 2d at 488. The issues this case presents, however, are ripe for decision now. Nothing in either Century Federal's challenge to the conditions in its license or the District Court's ruling invalidating Appellants' access, universal service and facilities and equipment requirements turns on any facts unique to Palo Alto or Atherton. Instead, as noted above, the District Court simply found such requirements to be *per se* unconstitutional.

[24] For example, Section 612's requirement that cable operators provide commercial leased access is keyed to the number of channels in the

sion dramatically upsets the careful balance struck by Congress between the rights and obligations of cable television operators and those of local franchising authorities. If the District Court's decision stands, cable television operators will continue to receive the benefits conferred by the Cable Act—such as its limits on the power of cities to fail to renew franchises[25] and its restriction of rate regulation[26]—without having to comply with franchise obligations to provide access channels, specified facilities and equipment, and universal service which Congress authorized franchising authorities to exact. Plainly such one-sided legislation could never have passed Congress—which was repeatedly told that the Act was compromise legislation supported by both representatives of cable franchisers and the National Cable Television Association.[27] Yet the District Court's decision truncates the Act by depriving cities and other local franchising authorities of the power to exact franchise conditions which Congress intended them to impose and which it believed to be both constitutional[28] and in the public interest. This Court has jurisdiction

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operator's system. *See* note 16, *supra*. If, however, as the District Court held, local franchising authorities cannot require an operator to provide a minimum number of channels, the applicability of Section 612 will depend wholly on the voluntary decision of a cable operator to provide a system with thirty-six or more channels. Appellants do not believe that Congress intended that the commercial leased access requirements which it made mandatory could be so easily evaded.

[25] *See* Cable Act § 626, 47 U.S.C. § 546.

[26] Cable Act § 623, 47 U.S.C. § 543; *see* 50 Fed. Reg. 18, 648-50, 18, 661-62 (May 2, 1985) (adopting 47 C.F.R. § 76.33).

[27] *See, e.g.*, 130 Cong. Rec. H10435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (Cable Act is "a compromise bill that both the cities and the cable industry can wholeheartedly support"); *id.* at H10442 (statement of Rep. Dingell) (Cable Act was the product of negotiations between the National League of Cities and the U.S. Conference of Mayors and the National Cable Television Association). Indeed, the Senate was told that it would have been difficult or impossible to pass cable legislation without agreement between the cities and the cable industry. 130 Cong. Rec. S14283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).

[28] *See, e.g.*, House Report at 36 (discussion of First Amendment issues raised by Cable Act's requirements for commercial and PEG

under 28 U.S.C. § 1252 to repair the damage caused to the Cable Act by the District Court's decision, so that the Act will once again become the compromise, bipartisan legislation which Congress intended to enact.

B. The United States Became a Party to the Proceeding Below When It Intervened by Filing a Memorandum in Response to the District Court's Certification Under 28 U.S.C. § 2403(a)

On June 10, 1987, the District Court notified the Attorney General, pursuant to 28 U.S.C. § 2403(a), that the motions for partial summary judgment filed by Appellants and Century Federal had "draw[n] into question" the constitutionality of at least seven sections of the Cable Act. App. 110a.[29] The notice advised the Attorney General that the United States could "intervene in this action by filing a memorandum and supporting evidence addressing the question of the Act's constitutionality." *Id.*

In response to the District Court's certification, the United States did precisely what the court's letter invited: it intervened in the case by filing a seventeen-page memorandum addressing the constitutional questions identified in the District Court's letter. App. 112a-128a. In that memorandum, the United States invoked the principle that statutes should be construed to avoid constitutional questions (App. 125a), and offered a construction of the Act that, if accepted, would have rendered the statute all but invulnerable to constitutional challenge.[30] Thus, the United States

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access, concluding that the Committee which passed the Act "has secured the First Amendment right of the viewers and listeners to a diversity of information sources, in the manner least restrictive on the cable operators' First Amendment interests").

[29] While the District Court's letter referred only to Appellants' motion, its September 1, 1987 order stated that its Section 2403(a) certification was prompted by the cross-motions filed by both Appellants and Century Federal. App. 1a-2a n.1.

[30] As noted above, the United States argued that the Act does not provide franchising authorities with the power to impose the requirements set forth therein, but only removes the threat of federal preemption if such power is exercised. *See* pp. 10-11, *supra*. The District Court properly rejected this argument. *See* p. 11, *supra*. If the court had accepted it, however, the Act probably would have been held constitu-

told the court that, in its view, the Cable Act "falls well within the mainstream of traditional regulatory federal oversight" concerning cable television (App. 118a), a proposition which, if accepted by the court, would doubtless have been tantamount to a ruling that the Act is constitutional. The memorandum filed by the United States therefore presented "argument on the question of constitutionality" within the meaning of Section 2403(a). Its filing, in response to a letter which specifically informed the federal government that it could intervene in the case by submitting such a memorandum, amounted to intervention under that statute.

Any doubt on this score is removed by the actions of the United States, the other parties to this case, and the District Court following submission of the United States' memorandum. In a status conference held shortly after the United States filed its memorandum, the U.S. Attorney advised the court and all parties that the United States wanted to be served with all pleadings. The parties have since complied with this request, listing the United States as a party in proofs of service filed with the court. App. 129a-130a. Similarly, the District Court in its September 1, 1987 order advised the United States that it did not have to file further briefs on the issues which the court reserved for decision (App. 15a), a statement which would have been unnecessary if the court had not considered the United States to be an ongoing party to the lawsuit subject to its jurisdiction.

II

THE CONSTITUTIONAL QUESTIONS THIS CASE PRESENTS ARE SUBSTANTIAL

As the Chief Justice recently observed, "[i]t has been the unvarying practice of this Court . . . to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional." *Bowen v. Kendrick*, ____ U.S. ____, 97 L. Ed. 2d 787 (1987) (Rehnquist, C. J.), *prob. juris. noted*, ____ U.S. ____, 56 U.S.L.W. 3338 (Nov. 9, 1987). This case should be no exception. Moreover, the

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tional, since a statute that does no more than remove the threat of federal preemption if a state passes a particular ordinance would not seem to be open to serious challenge under the First Amendment.

constitutional issues presented by the District Court's sweeping rulings are in fact of great importance and urgency. The District Court's decision invalidates key provisions of the Cable Act which authorize and/or compel local franchising authorities to impose requirements on cable operators to provide third-party access, universal service, and specified facilities and equipment. *See* Part I(A), *supra*. Moreover, this case also presents a separate, but related issue of equal importance: whether a municipal franchising authority may limit the number of cable franchisees to one.

A. The District Court's decision invalidating the access, universal service and facilities and equipment provisions of the Cable Act leaves gaping holes in a statute which Congress enacted to "assure that cable systems provide the widest possible diversity of information sources and services to the public." Cable Act § 601(4), 47 U.S.C. § 521(4). The importance of this objective—and of the constitutional questions this case presents—cannot be seriously doubted. With respect to access, for example, the Court has often stressed that providing diverse sources of information is an important governmental objective. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-96, 801 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). This First Amendment interest exists not only to protect speakers, but also to expand the opportunities of listeners, readers and viewers. *CBS v. FCC*, 453 U.S. 367, 396 (1981); *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978). Indeed, as the Court observed in *Red Lion*, *supra*, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is *paramount*." 395 U.S. at 390 (emphasis added).

Ensuring such access is particularly important with respect to cable television. This Court has cited the FCC's position that "the advent of cable television will afford unusual opportunities for the discussion of public issues." *CBS v. Democratic National Committee*, 412 U.S. 94, 131 (1973). Indeed, in the *CBS* case, the Court cited a proposed FCC rule requiring cable operators to provide at least one noncommercial public access channel as an example of a "limited right of access" that would be "both practical and desirable." *Id.* Under the District Court's opinion, however, such access has been held unconstitutional, despite the

evidence submitted by Appellants that cable is almost always a natural monopoly. *See* pp. 6-7 & note 4, *supra*.[31] If that opinion stands, the available range of cable television programming will in all but a few communities be subject to the sole discretion of a single cable television operator.

Ensuring that all citizens have access to cable is an equally important governmental objective. Cable systems are capital intensive, and the cost increases in direct proportion to the number of miles of cable laid. W. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING, 46-47, 52 (Rand 1973). Neighborhoods with a relatively dense population can be wired at a lower per-unit cost. *Id.* at 47. All other factors being equal, the operator can maximize profits by concentrating service in densely populated areas. *Id.* at 47-48. Similarly, because demand for cable service is higher in middle or high-income neighborhoods (*id.* at 42), cable operators prefer to lay cable in such areas rather than in low-income neighborhoods. *See* 1 C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW ¶ 13.15(3)(d) (1985); *Report and Order*, 66 F.C.C.2d 380, 388-89, 392-93 (1977); *Cable Television Report and Order*, 36 F.C.C.2d 143, 208 (1972). For these reasons, unless franchising authorities can compel universal service "so that residents of lower income areas are not deprived of cable" (House Report at 20), cable's benefits will be available only to those individuals fortunate enough to live in

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[31] For expert testimony that cable is a natural monopoly, *see* Besen Decl. (filed July 18, 1986), Ex. A, ¶¶ 5-10, 31-34, 40-41, 43-45. For data regarding the scarcity of head-to-head competition between cable operators, *see id.* at ¶¶ 34-39; Sinel Decl. (filed July 18, 1986) ¶¶ 17(a)(b); Smith Decl. (filed July 18, 1986) ¶¶ 40-42. In addition to the evidence presented to the District Court, there is also substantial support in the literature for this proposition. *E.g.*, BESEN & JOHNSON, AN ECONOMIC ANALYSIS OF MANDATORY LEASED CHANNEL ACCESS FOR CABLE TELEVISION 22 (Rand 1982); Berkin, *Hit or Myth?: The Cable TV Marketplace, Diversity and Regulation*, 35 FED. COMM. L.J. 41, 61-66 (1983); E. Noam, *Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition*, COMMUNICATIONS REGULATION TODAY AND TOMORROW 351, 355-59 (Noam ed. 1983).

areas which a cable operator determines will be profitable to serve.[32]

The statutory purpose of promoting "the widest possible diversity of information sources and services to the public" is also served by a franchising authority's power to impose requirements for adequate channel capacity. Such capacity ensures that many voices will be heard on a franchisee's cable system, by enabling the cable operator to offer a broad array of programming itself, to provide access channels for the public, government, and educational institutions, and to lease additional channels to other commercial cablecasters. Absent regulation, however, there is a substantial risk that a cable operator may choose to limit its already high capital costs by installing a system with minimal capacity, thereby decreasing the diversity of available programming and precluding meaningful cable access. Noam, *Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 FED. COMM. L.J. 209, 214 (1982).

Finally, the Cable Act's grant of power to franchising authorities to impose facilities and equipment requirements also serves the Cable Act's purpose of promoting a diverse array of cable services. In passing the Act, Congress recognized that cable franchising provides the most effective means by which cities can negotiate for high standards of equipment and service, including such First Amendment-enhancing features such as two-way capability and the "institutional network." *See* Cable Act § 624, 47 U.S.C. § 544; House Rep. at 68-69. As the House Committee observed, "[t]he ability of a local government entity to require particular cable facilities (and to enforce requirements *in the franchise* to provide those facilities) *is essential if cable systems are to be tailored to the needs of each community* . . . ." *Id.* at 26 (emphasis added). If, however, as the District Court held, such requirements may not be imposed, local franchising authorities

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[32] As the House Report noted, the interrelationship between requiring access channels and other First Amendment-enhancing services and equipment and ensuring that all citizens in a community have the opportunity to receive cable is obvious: "The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all of our citizens." House Report at 36.

will have no means to invoke their federally-granted authority to ensure that cable systems are responsive to community needs.

If the District Court decision stands, *each* of the means by which Congress sought to ensure that cable would provide "the widest possible diversity of information sources and services" will be rendered ineffectual. Even if—because of cable's status as a natural monopoly—a community will have only one cable television system, it will be unable to require the cable operator to provide either commercial or PEG access, to wire the entire city, to provide channel capacity adequate to ensure a wide variety of programming or to provide facilities and equipment such as two-way capability and an institutional network. Such constitutionally-compelled deregulation frustrates, rather than enhances, First Amendment values; it is, moreover, the antithesis of the complex and detailed regulatory regime which Congress envisioned when it enacted the Cable Act.

B. The significant issues presented to this Court by this appeal are not limited to those addressed by the District Court in its order invalidating access, universal service and facilities and equipment requirements. If this Court accepts jurisdiction of the appeal, the "whole case" will be before the Court for review. *McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975). Thus, the Court will be able to consider not only the merits of the District Court's September 1, 1987 order, but also its earlier ruling holding that Appellants may not constitutionally limit the number of cable franchisees to one.

As this Court noted in *City of Los Angeles v. Preferred Communications*, the Cable Act endorsed the franchising process as the appropriate mechanism for cable television regulation. 90 L. Ed. 2d 480 at 485 n.1; *see also* House Report at 19 (Act "continues reliance on the local franchising process as the primary means of cable television regulation"). The Cable Act incorporates the franchising process in Section 621(a)(1), which provides that a "franchising authority may award . . . 1 or more franchises within its jurisdiction." The Act also prohibits construction of a new cable system without a franchise. § 621(b)(1), 47 U.S.C. § 541(b)(1).

Section 621 was unambiguously intended to authorize franchising of only one cable operator: it "grants to the franchising authority the discretion to determine the number of cable opera-

tors to be authorized to provide service in a particular geographical area." House Report at 59. The District Court, however, held that Appellants acted unconstitutionally when they exercised the authority granted them by Section 621(a)(1) to deny Century Federal a franchise.

In this decision, too, the District Court destroyed a critical part of the Cable Act. Without the ability to restrict the number of franchises, the interests which Congress sought to promote by passing the Act cannot be effectively promoted. If, as the District Court held, a city constitutionally may not refuse to issue a franchise if its physical facilities can accommodate more than one cable operator and installation of all systems can occur simultaneously, a prospective cable operator would have no reason to agree to provide universal service, up-to-date equipment and facilities, or community access facilities and channels. Such features undoubtedly increase the operator's costs without, for the most part, producing fully offsetting additional revenue. For this reason, if a city cannot assure a prospective franchisee that it will not have to share its market with a competitor, and thus spread its costs over fewer subscribers, cable operators will be disinclined to provide such services. Conversely, if a local franchising authority cannot refuse a franchise, it cannot provide a cable operator with the incentive of an exclusive franchise or one of a limited number of franchises in return for the operator's voluntary agreement to provide the First Amendment- enhancing features described above.[33]

In *City of Los Angeles v. Preferred Communications*, the Court recognized the importance of this issue by granting certiorari, although it eventually declined to rule definitively on the constitutionality of limiting the number of cable franchisees and sent the case back to the District Court so that "the material factual

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[33] Even if the District Court were correct in holding that some of the requirements which the Cable Act permits local franchising authorities to impose on cable operators are unconstitutional, the ability of a local franchising authority to restrict the number of franchises would still be useful. For example, a ruling that the First Amendment prohibits a city from *imposing* access requirements on an unwilling cable operator would not necessarily prevent a city from using the incentive provided by a limited number of franchises to obtain a cable operator's voluntary agreement to provide access channels.

disputes [could] be resolved." 90 L. Ed. 2d at 488. But while the *Preferred Communications* case came to this Court at the pleading stage, the District Court purported to resolve the identical issue in this case on a motion for summary judgment as to which both parties submitted numerous and lengthy affidavits. In granting summary judgment, the District Court necessarily found that no triable issues of fact existed on the question of whether Appellants could constitutionally deny a franchise to Century Federal. Accordingly, this case is ripe for decision—as *Preferred Communications* was not—on the constitutional issue of whether a local franchising authority may exercise the power granted it by the Cable Act and limit the number of cable franchisees to one.

CONCLUSION

Section 1252 is an "exception" to the general policy "of minimizing the mandatory docket of this Court . . . ." *Walters v. National Association of Radiation Survivors*, *supra*, 473 U.S. at 316-17 (quoting *McLucas v. Champlain*, *supra*, 421 U.S. at 30). This "exception" is designed to afford expedited appellate review by this Court when a district judge has taken the drastic step of declaring a duly-passed Act of Congress unconstitutional in a case to which the United States is a party.

That is precisely what has occurred here. The District Court's decision, rendered after the United States intervened, nullifies both the Cable Act's requirements that cable operators provide commercial leased access and universal service and its statutory grant of authority to cities to compel PEG access, adequate channel capacity and specified facilities and equipment. Moreover, the District Court's previous decision invalidates the Act's grant of authority to cities throughout the Nation to select a cable franchisee from among competing applicants by weighing their willingness to provide such First Amendment-enhancing features.

The cumulative effect of the decisions below is to leave cities largely at the mercy of cable operators. Even though such operators use the public streets and rights-of-way, cities will be unable to insist that service be provided to all members of the public who are willing to pay the applicable rates. Even though most cities will have only one cable operator, cities will be unable to require cable operators to provide access, adequate channel capacity or two-way capability. This plainly is not what Congress

provided when it passed the Cable Act. The Court should therefore note probable jurisdiction and reverse the District Court's orders invalidating the access, universal service and facilities and equipment requirements in the Century Federal license and requiring Appellants to grant Century Federal a license without participating in Appellants' RFP process.

Date: December 7, 1987

Respectfully,

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